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NOTES

WORKMEN'S COMPENSATION AND THIRD PARTY SUITS: THE AFTERMATH OF WITT v. JACKSON

In *Witt v. Jackson*,[1] the California Supreme Court established two principles in the field of workmen's compensation as it relates to third party actions. It was held that a negligent employer could not take advantage of his own wrong through the recoupment provisions of the Workmen's Compensation Act, and further, that the injured employee could not receive a double recovery for the same injuries.

The difficulties inherent in applying simultaneously what may be mutually exclusive principles are illustrated by cases subsequent to *Witt* in which the courts have been forced to apply one principle at the expense of the other.[2] This Note will examine the numerous solutions that have been presented by the courts, and will propose some possible alternatives. First, however, a brief diversion into the history and structure of the workmen's compensation acts is necessary to understand the context of the *Witt* decision and the circumstances that make the concurrent enforcement of both principles of *Witt* difficult, if not sometimes impossible.

The Background to Witt v. Jackson

Origins of the Workmen's Compensation Acts

Under the early English common law, no distinction was made between an employer's liability to his injured servant and his liability to a third person.[3] The employer's common law liability to his servant was restricted by the defenses of contributory negligence, assumption of risk, and the fellow-servant rule.[4] The employer was merely obligated to provide the employee with a safe place to work and safe equipment and tools, warn of dangers inherent in the employment, hire able coemployees, and make reasonable rules for the exercise of the

1. 57 Cal. 2d 57, 73, 366 P.2d 641, 650, 17 Cal. Rptr. 369, 378 (1962).

2. See cases cited notes *infra*.

3. 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.02 (2d ed. 1968) [hereinafter cited as HANNA].

4. The fellow servant rule provided that the employer was not liable for injuries caused by the negligence of a coworker. For a discussion of the common law defenses see *id.* § 1.02[4](a)-(f); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 549-54 (3d ed. 1964) [hereinafter cited as PROSSER].

business.[5] Beyond these specific requirements, the employee assumed the burden of industrial injuries, even though he was often in no financial position to do so.

In the early decades of the 20th century, American jurisdictions began to provide systems of workmen's compensation[6] based upon a theory of the employer's strict but limited liability for injuries incident to the employment.[7] Liability imposed under such a system was neither in tort nor in contract, but was considered incident to the relation of employer-employee.[8]

The objectives of the workmen's compensation acts were also different from the purpose of recovery in a common law personal injury action. The compensation statutes were designed to provide the injured employee and his dependents with an adequate means of subsistence while the employee was recuperating from his injury; this, in turn, helped bring about speedy recovery which permitted the employee to return to productive employment within a relatively short period.[9] Whereas the common law provided an employee remuneration for the negligence of the employer, the workmen's compensation statutes merely furnished the employee with economic insurance for risks which he undertook incident to his employment.[10]

While the constitutionality of the workmen's compensation acts has often been questioned, their validity has been consistently upheld on the ground that the industry should assume liability for industrial injuries as a part of the cost of production.[11]

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5. PROSSER 545-49.

6. *Id.* at 554; 2 HANNA § 1.03[2](a),(c).

7. PROSSER 555.

8. Quong Ham Wah Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 36, 192 P. 1021, 1025 (1920); Solari v. Atlas-Universal Serv., Inc., 215 Cal. App. 2d 587, 600, 30 Cal. Rptr. 407, 414 (1963); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW 1652 (7th ed. 1960).

9. Solari v. Atlas-Universal Serv., Inc., 215 Cal. App. 2d 587, 600, 30 Cal. Rptr. 407, 414 (1963). In West v. Industrial Acc. Comm'n, 79 Cal. App. 2d 711, 180 P.2d 972 (1947) the court said: "[T]he purpose of the award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. In short the award transfers a portion of the loss suffered by the disabled employee from him and his dependents to the consuming public. Complete protection is not afforded the employee from disability because this would constitute an invitation to malinger or to be careless on the job as he would then lose nothing in assuming a disabled status." *Id.* at 721, 180 P.2d at 978 (citations omitted).

10. Jacobsen v. Industrial Acc. Comm'n, 212 Cal. 440, 447, 299 P. 66, 68-69 (1931); *see* West v. Industrial Acc. Comm'n, 79 Cal. App. 2d 711, 721-26, 180 P.2d 972, 978-82 (1947). *See also* CAL. CONST. art. 20, § 21, wherein it is stated: "[The purpose of a system of workmen's compensation is to] accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character . . . ." *See* CAL. LABOR CODE § 3201.

11. Western Indem. Co. v. Pillsbury, 170 Cal. 686, 694, 151 P. 398, 407

Rights of the Employer and Employee under California's Workmen's Compensation Act

The employee, who is required to take certain risks inherent in his employment, is assured of economic assistance through workmen's compensation benefits should he suffer an industrial injury. Under section 3601 of the California Labor Code, the right of the employee to workmen's compensation benefits paid by the employer is an exclusive remedy.[12] To receive an award, the employee need merely show that the injury arose out of and in the course of his employment; he is not required to show fault on the part of his employer.[13] This award, however, in no way abrogates the employee's common law right to sue a third party who has caused his injury.[14] California courts have gone so far as to hold that the receipt of workmen's compensation benefits is extraneous to the issue in a third party suit and cannot properly be considered.[15]

The employer, under the Workmen's Compensation Act, is required to insure, in one way or another, against liability for workmen's compensation.[16] Whether or not the employer is at fault, he is obligated to pay benefits as provided by statute. Imposition of such liability is in lieu of common law liability to the employee[17] and thus shields the employer from any legal action his employee might subse-

(1915). For a summary of cases see 55 CAL. JUR. 2d *Workmen's Compensation* § 4, at 16 nn.18, 20 (1960). *See also* Dominguez v. Pendola, 46 Cal. App. 220, 224, 188 P. 1025, 1026 (1920).

12. CAL. LABOR CODE § 3601 provides: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy . . . against the employer . . . ." *See* Duprey v. Shane, 39 Cal. 2d 781, 796, 249 P.2d 8, 13 (1952).

13. CAL. LABOR CODE § 3600; 2 B. WITKIN, *supra* note 8, at 1662. *See also* CAL. LABOR CODE § 3202; 2 HANNA § 8.02[2].

14. CAL. LABOR CODE § 3852, *construed in* Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co., 150 Cal. App. 2d 253, 258, 309 P.2d 849, 852 (1957); Huber v. Henry J. Kaiser Co., 71 Cal. App. 2d 278, 285, 162 P.2d 693, 696 (1945); Ferrario v. Conyles, 19 Cal. App. 2d 58, 61, 64 P.2d 975, 976 (1937). In Lamoreux v. San Diego & Ariz. E. Ry., 48 Cal. 2d 617, 311 P.2d 1 (1957) the court stated: "An employee is entitled to receive the compensation benefits prescribed by statute without jeopardizing his right to proceed against a third party tort feasor. The Labor Code provides that this right of action is not barred by the filing of a claim for compensation, and . . . neither the making of an award by the commission nor the payment of the award by the employer will preclude suit against the third person . . . . [P]ayment of the full amount of workmen's compensation is not to be considered as satisfaction of the third party's tort liability, and the same rule should apply to payment of a compromise award." *Id.* at 625, 311 P.2d at 5-6.

15. De Cruz v. Reid, 69 Cal. 2d 217, 225, 444 P.2d 342, 348, 70 Cal. Rptr. 550, 555 (1968); Baroni v. Rosenberg, 209 Cal. 4, 6, 284 P. 1111, 1113 (1930).

16. CAL. LABOR CODE §§ 3700-03.

17. *See* Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co., 150 Cal. App. 2d 253, 258, 309 P.2d 849, 852 (1957).

quently file against him.[18] In addition, if the employer is free from fault and the injured employee recovers a judgment against a third party tortfeasor, the employer has the right to recoup benefits paid to the injured employee.[19]

The employee and employer are given a joint and several cause of action against an allegedly negligent third party.[20] The employee[21] is entitled to all damages proximately resulting from the injury; the employer can recover[22] all compensation benefits paid, and any additional amounts paid in the way of salary, pensions, medical expenses and the like.[23] The theory behind giving a joint cause of action is that

> such an injury to the employee also constitutes an indirect injury to the employer who must provide the workmen's compensation benefits . . . . Subrogation is the remedy provided by law to enable the employer or his insurance carrier, if he has one, to recoup his damage at the expense of the negligent third party.
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> Subrogation . . . . [a]s applied to third party claims . . . is the independent right of an employer or insurance carrier against a third party, by whose fault the employee has sustained an industrial injury, to recover . . . expenditures for compensation.[24]

The employer is not restricted solely to bringing action in his own name;[25] he can join as a party plaintiff in a suit previously filed by the

18. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 200 Cal. 579, 583, 253 P. 926, 928 (1927), *aff'd*, 276 U.S. 467 (1928). Of course if the employer intentionally injures the employee, the employee may bring a common law action against him. Carter v. Superior Court, 142 Cal. App. 2d 350, 354, 298 P.2d 598, 600 (1956); Conway v. Globin, 105 Cal. App. 2d 495, 498, 233 P.2d 612, 614 (1951).

19. CAL. LABOR CODE §§ 3852, 3853, 3856(b).

20. *Id.* § 3852. *See, e.g.*, City of Los Angeles v. Howard, 80 Cal. App. 2d 728, 182 P.2d 278 (1947); Limited Mut. Comp. Ins. Co. v. Billings, 74 Cal. App. 2d 881, 169 P.2d 673 (1946); State Comp. Ins. Fund v. Matulich, 55 Cal. App. 2d 528, 131 P.2d 21 (1942); 2 HANNA § 23.02[1]. Originally the making of a claim for compensation by the employee operated as a transfer from the employee to the employer of the right to recover damages against a third party. Cal. Stats. 1913, ch. 176, § 31, at 295. Because a refusal of the employer to join as party plaintiff could easily defeat the employee's common law right to sue the third party, this rule was somewhat modified in Stackpole v. Pacific Gas & Elec. Co., 181 Cal. 700, 702-04, 186 P. 354, 354-55 (1919), *and* Hall v. Southern Pac. Co., 40 Cal. App. 39, 42-43, 180 P. 20, 21 (1919), by holdings that if the employer refused to join as party plaintiff, under CAL. CODE CIV. PROC. § 382, the employer could be made a defendant, if the reason thereof was stated in the complaint.

21. CAL. LABOR CODE § 3850(a) provides: " 'Employee' includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former."

22. CAL. LABOR CODE § 3850(b) provides: " 'Employer' includes insurer as defined in this division." *See also* CAL. INS. CODE § 11662.

23. CAL. LABOR CODE § 3852.

24. 2 HANNA § 24.01[1], [2]. *See also* CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 593 (Cal. Cont. Educ. Bar ed. 1963); Conley & Sayre, *Rights of Indemnity as They Affect Liability Insurance*, 13 HASTINGS L.J. 214 (1961).

25. CAL. LABOR CODE § 3852.

employee,[26] or allow the employee to prosecute the suit independently and then claim a first lien on the employee's judgment in the amount of expenditures for compensation.[27]

The Employer's Negligence and Its Effect Upon the Recoupment Provisions

Within the workmen's compensation provisions, there is no indication whether the employer's negligence will defeat his right to recoup benefits paid to the injured employee. A brief consideration of the historical background of the rule regarding the employer's negligence will provide some insight into the problems with which the courts were faced in trying to reach the most equitable result.

From the concept that the workmen's compensation system was in no way designed to afford any benefits or immunities to strangers,[28] it followed that the negligence of the insured employer would in no way relieve the negligent third party of his common law liability. In *Pacific Indemnity Co. v. California Electric Works*,[29] the court stressed that since there were no provisions in the workmen's compensation statutes which conditioned the employer's right to recoupment on his lack of fault or negligence, neither would the court so qualify his right.[30]

Even though section 1717 of the California Civil Code allows the defense of contributory negligence in all actions, it was held in *Milosevich v. Pacific Electric Railway*[31] to be inapplicable to the workmen's

26. *Id.* § 3853.

27. *Id.* § 3856(b). *See also id.* § 3857. For a discussion of the means by which an employer may recoup the amounts he has disbursed, see Witt v. Jackson, 57 Cal. 2d 57, 69, 360 P.2d 641, 648, 17 Cal. Rptr. 369, 376 (1961); Burum v. State Comp. Ins. Fund, 30 Cal. 2d 575, 580-81, 184 P.2d 505, 507 (1947); Benwell v. Dean, 249 Cal. App. 2d 345, 359, 57 Cal. Rptr. 394, 403-04 (1967); Tate v. Superior Court, 213 Cal. App. 2d 238, 246-47, 28 Cal. Rptr. 548, 552-53 (1963); Quisenberry v. Rulison, 129 Cal. App. 2d 268, 269, 277 P.2d 57, 58 (1954). Under CAL. LABOR CODE § 3853, if the employee or employer brings an action independently against the third party, he is required to give notice of the action, and the name of the court in which the action is brought, by personal service or registered mail. The purpose of the notice requirement is to enable the employer to decide whether to join in the action and employ his own attorney, or to permit the employee to proceed alone, and file a claim for a first lien on the judgment recovered. Quisenberry v. Rulison, 129 Cal. App. 2d 268, 270-71, 277 P.2d 57, 59 (1954). *See also* Driscoll v. California St. Cable R.R., 80 Cal. App. 208, 213-14, 250 P. 1062, 1064 (1926); Van Zandt v. Sweet, 56 Cal. App. 164, 166-67, 204 P. 860, 861 (1922).

28. Sanstad v. Industrial Acc. Comm'n, 171 Cal. App. 2d 32, 35, 339 P.2d 943, 944 (1959); 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 71.00 (1968) [hereinafter cited as LARSON].

29. 29 Cal. App. 2d 260, 84 P.2d 313 (1938).

30. *Id.* at 267-71, 84 P.2d at 318; *accord*, Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 434-35, 218 P.2d 17, 33 (1950).

31. 68 Cal. App. 662, 230 P. 15 (1924).

compensation laws. The basis for this reasoning was the statutory provision that "[i]f the employee joins in, or prosecutes such suit . . . evidence of the amount of disability indemnity or death benefits paid by the employer shall not be admissible."[32] The court reasoned that this provision evidenced a legislative intent that the third party action would be determined without reference to what was paid in benefits to the injured employee; and, if there could be no reference to such benefits, it would be impossible to determine the amount of damages by which to reduce the judgment against the third party if the employer himself were found to be concurrently negligent with the third party for the employee's injuries.[33]

The better reasoned and more prevalent basis for this result was that prior to 1957, the common law rule barring contribution or indemnity between joint tortfeasors still existed.[34] If the third party tortfeasor's damages were reduced by the amount of workmen's compensation benefits received by the injured workman, there would, in effect, be contribution from the employer.[35]

In 1957, the California legislature enacted sections 875 to 880 of the Code of Civil Procedure, commonly referred to as the Joint Tortfeasors Act, which limited the right of contribution to situations "where a money judgment has been rendered jointly against two or more defendants in a tort action."[36] Because the employee has an exclusive remedy against the employer for workmen's compensation benefits and therefore cannot sue the employer in tort and obtain a money judgment against him, the Joint Tortfeasors Act, which requires a joint money judgment, has offered the courts no basis for barring recoupment by a concurrently negligent employer.[37]

Witt v. Jackson

Prohibition of the Negligent Employer's Right of Recoupment

Until 1961, the courts continued to allow a negligent employer to reimburse himself at the expense of a third party tortfeasor.[38] In that year, in the decision of *Witt v. Jackson*,[39] the supreme court estab-

32. *Id.* at 668, 230 P. at 17.

33. *Id.*

34. *E.g.*, Pacific Indem. Co. v. California Elec. Works, 29 Cal. App. 2d 260, 265, 84 P.2d 313, 316 (1938).

35. *Cf. id.* at 269-70, 84 P.2d at 318-19.

36. CAL. CODE CIV. PROC. § 875(a).

37. Chick v. Superior Court. 209 Cal. App. 2d 201, 203-04, 25 Cal. Rptr. 725, 727 (1962); American Can Co. v. City & County of San Francisco, 202 Cal. App. 2d 520, 523, 21 Cal. Rptr. 33, 34 (1962). *See generally* 2 LARSON §§ 76.21-.22.

38. 2 LARSON § 75.23.

39. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961), *overruling* Finnegan

lished the right of the third party tortfeasor to raise as a defense the concurrent negligence of the employer to reduce the judgment against him. An action for damages was brought by two policemen—Witt, the driver of the automobile, and Grossman, the passenger—for personal injuries suffered as a result of a rear-end collision. Their employer, the City of Los Angeles, intervened to recover for damages to its car, and for workmen's compensation benefits and medical expenses paid to its injured employees. The defendant raised the issue of Witt's contributory negligence to defeat the city's right to recover benefits paid to its employee Grossman. The court held that while the Labor Code did not state specifically that the employer's right of recoupment was qualified by his freedom from fault, there was nothing to suggest that the legislature contemplated that the negligent employer could take advantage of the reimbursement provisions.[40] It was held that where the legislature did not provide to the contrary, the provisions of the Labor Code were modified by Civil Code section 3517, which provides that "[n]o one can take advantage of his own wrong."[41]

As a result of the *Witt* decision, when a third party tortfeasor has pleaded and proved that the negligence of the employer or his agent has proximately caused the injury suffered by the employee,[42] he is entitled to have the judgment against him reduced by the amount of compensation benefits received by the employee.[43] The employer does not benefit from his own wrong by taking advantage of the recoupment

v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17 (1950), *and* Pacific Indem. Co. v. California Elec. Works, 29 Cal. App. 2d 260, 84 P.2d 313 (1938).

40. 57 Cal. 2d at 70, 366 P.2d at 649, 17 Cal. Rptr. at 377.

41. 57 Cal. 2d at 72, 366 P.2d at 649, 17 Cal. Rptr. at 377 (1961). *See also* 50 CALIF. L. REV. 571 (1962).

42. Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 485, 490, 45 Cal. Rptr. 454, 457 (1965); CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 620, (Cal. Cont. Educ. Bar ed. 1963). After the *Witt* decision, the question arose whether the employer had to be joined by cross-complaint in order to defeat his right to recoupment. In Sacramento v. Superor Court, 205 Cal. App. 2d 398, 402, 23 Cal. Rptr. 43, 46 (1962), the court held that whether an action is brought by an employee or employer, the third party should be able to raise the issue of the concurrent negligence of the employer to bar the latter's right of recovery. Because the suit is brought for the benefit of the employer, since he is entitled to recoup benefits paid, the rule applies whether the employer sues, joins in the employee's suit as party plaintiff, or claims a first lien on the judgment obtained by the employee. In Vegetable Oil Prod. Co. v. Superior Court, 213 Cal. App. 2d 252, 256, 28 Cal. Rptr. 555, 558 (1963), it was held that where the issue of concurrent negligence is properly raised by answer, no cross-complaint is necessary. Since the employee in effect represents the interest of the employer, in Benwell v. Dean, 249 Cal. App. 2d 345, 361, 57 Cal. Rptr. 394, 405 (1967), the court held that the employer was properly represented and there was no violation of due process of the law.

43. Witt v. Jackson, 57 Cal. 2d 57, 73, 366 P.2d 641, 650, 17 Cal. Rptr. 369, 378 (1961).

provisions, but neither is he required to pay an amount greater than his limited liability under the workmen's compensation statutes.[44] This reduction not only prevents the negligent employer from benefiting from his own wrong, but also prohibits the employee from receiving duplicate damages for the same injury.

Problems in the Enforcement of the Witt Principles

The supreme court in *Witt v. Jackson* thus established two principles to be applied in third party suits involving an injured employee. First, a negligent employer can not take advantage of his own wrong at the expense of the third party tortfeasor.[45] Second, the injured employee can not receive a double recovery for his injuries.[46] Since this decision, however, California courts have been continually plagued with the difficulty of enforcing these principles simultaneously.[47]

One of the primary problems of enforcing the *Witt* principles arises from section 3861 of the Labor Code, which empowers the Workmen's Compensation Appeals Board to credit against the employer's work-

44. CAL. LABOR CODE § 3864 provides: "If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to injury." *See* 2 LARSON § 71.20. While the *Witt* decision has generally been accepted as the most equitable method of distributing the burden of the injury between the faulty parties, 50 CALIF. L. REV. 571, 575 (1962), there have been experts who have presented valid and pertinent criticism to the principles espoused in the decision.

Larson indicates that the decision should be restricted to instances in which the employer is personally negligent. Where a coworker has been negligent and injured the employee, there is no moral problem of allowing a personally guilty employer to recover at the third party's expense. And holding the employer liable for the coworker's negligence has no proper legal basis, since principles of vicarious liability do not apply when one negligent employee injures a coemployee, according to the fellow-servant rule. 2 LARSON § 75.23.

Professor Riesenfeld states that although the allocation scheme adopted by *Witt* has been designated as the most equitable, this rests upon the assumption that the monetary burden of the third party will normally be greater than that of the employer, even where the extent of the employer's burden is the incurred liability rather than payments made at the time of litigation. He concludes that the employer will ordinarily have a greater share to pay than will the third party, and thus, a system should be established which "leads to an equitable division of the *whole* loss, according to the degree of culpability of the parties." Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets*, 53 CALIF. L. REV. 207, 216-18 (1965).

45. 57 Cal. 2d at 73, 366 P.2d at 650, 17 Cal. Rptr. at 378; *accord*, Nelsen v. Capitol Roof Structures, 34 Cal. Comp. Cases 238, 239-40 (1969).

46. Witt v. Jackson, 57 Cal. 2d 57, 73, 366 P.2d 641, 650, 17 Cal. Rptr. 369, 378 (1961); *accord*, Nelsen v. Capitol Roof Structures, 34 Cal. Comp. Cases 238, 239-40 (1969).

47. See cases cited notes 54-86 *infra*.

men's compensation liability such amounts as the employee obtains by judgment against the third party. In this regard, it is important to distinguish the employer's right to obtain a credit against accrued or unaccrued benefits not yet paid to an injured employee from the employer's right to a lien for benefits already paid against a judgment obtained by the employee.[48] The employer must apply for a lien on the judgment before the judgment is satisfied;[49] if he fails to do so, he is considered to have waived his right to the first lien.[50] By waiving the right to the lien, however, the employer cannot be said to have waived his right to a credit against benefits yet to be paid, since the statute requires the board to allow the credit without reference to the time of application.[51] When the employer brings suit, joins in the employee's suit, or applies for a first lien, he is seeking to recover benefits previously paid.[52] However, by applying for a credit against workmen's

48. *See* Nelsen v. Capitol Roof Structures, 34 Cal. Comp. Cases 238, 239-40 (1969).

49. Jacobsen v. Industrial Acc. Comm'n, 212 Cal. 440, 448, 299 P. 66, 69 (1931); Dighton v. Martin, 4 Cal. App. 2d 401, 405-06, 41 P.2d 197, 198 (1935); *cf.*, Lidberg v. E.T. Leiter & Son, 116 Cal. App. 312, 316, 2 P.2d 526, 528 (1931).

50. Jacobsen v. Industrial Acc. Comm'n, 212 Cal. 440, 448, 299 P. 66, 69 (1931).

51. Pacific Gas & Elec. Co. v. Industrial Acc. Comm'n, 8 Cal. App. 2d 499, 502-03, 47 P.2d 783, 785 (1935).

52. CAL. LABOR CODE § 3854. Under the workmen's compensation laws, pain and suffering are not compensable, unless it affects the employee's ability to perform his duties. Jacobsen v. Industrial Acc. Comm'n, 212 Cal. 440, 447, 299 P. 66, 68 (1931). Originally it was held that it would be unfair to have the employer attach his lien to that part of the third party judgment covering pain and suffering, since this would defeat the employee's right to recover for pain and suffering. Jacobsen v. Industrial Acc. Comm'n, 212 Cal. 440, 449, 299 P. 66, 69 (1931). The burden was upon the employer to segregate damages and thereby demonstrate which portion of the third party judgment was lienable. Lidberg v. E.T. Leiter & Son, 116 Cal. App. 312, 315, 2 P.2d 526, 528 (1931); Ansbach v. Department of Indus. Rel., 99 Cal. App. 677, 681, 279 P. 224, 225 (1929). In CAL. LABOR CODE § 3860(b) the entire amount of the third party judgment was made subject to the employer's lien. After the 1931 amendment, Cal. Stats. 1931, ch. 1119, § 26, at 2370, the court in Dighton v. Martin, 4 Cal. App. 2d 401, 41 P.2d 197 (1935), refused to hold that the entire judgment was lienable, and stated that the burden was upon the employee to protect his common law right by segregating the damages so as to prevent the employer from attaching his lien to the portion covering pain and suffering. *Id.* at 405, 41 P.2d at 199. In Heaton v. Kerlan, 27 Cal. 2d 716, 723, 166 P.2d 857, 861 (1946), *and* Pacific Gas & Elec. Co. v. Industrial Acc. Comm'n, 8 Cal. App. 2d 499, 504, 47 P.2d 783, 786 (1935), the entire amount of the judgment was held subject to the lien. Even if the employee attempts to segregate damages or intends to recover only those elements of damages which do not duplicate his compensation benefits, the employer will not be prevented from asserting the lien to which he is entitled under CAL. LABOR CODE §§ 3856, 3857. "This [is because the] action is necessarily, as a matter of law, one brought on behalf of the employer, if . . . [he] has made payments which can be recouped under . . . [the Labor Code]." Tate v. Superior Court, 213 Cal. App. 2d 238, 248, 28 Cal. Rptr. 548, 554 (1963). In 1959 CAL. LABOR CODE § 3856 was enacted,

compensation benefits to be paid, he seeks a set-off against any future liability he may incur under the workmen's compensation statute, and against any accrued benefits not already paid.[53]

As to the enforcement of the *Witt* principles, the dilemma presented by the credit provisions of the Labor Code may be illustrated as follows: An injured employee files an application for workmen's compensation benefits and receives $1000 from the compensation carrier for temporary disability and medical expenses. He then files a third party suit against the allegedly negligent tortfeasor for damages sustained. The employer's carrier applies for a lien on the judgment recovered; however, in his answer, the third party tortfeasor alleges the employer's concurrent negligence to defeat the carrier's right to recover benefits paid. The jury finds negligence on the part of both the third party and the employer as the proximate cause of the employee's injuries. Judgment in favor of the employee is rendered in the amount of $10,000, which is reduced by $3000 for attorney's fees and costs, and by $1000 for workmen's compensation benefits received, leaving the injured employee with a net recovery of $6000. The desired result is thereby achieved: The employee is prevented from receiving a double recovery, yet the employer does not benefit from his own wrong at the expense of the third party.

But suppose the employee, at a later date, goes before the board, applies for permanent disability, receives a permanent disability rating, and is awarded what will amount to $15,000 in disability benefits and pensions. The employer seeks a credit in the amount of $6000, the net recovery by the employee in his third party suit. If the employer is given such a credit, he appears to be benefiting from his own wrong. On the other hand, if the credit is refused, the employee receives a double recovery for his injuries.

This hypothetical situation demonstrates the dilemma created by the *Witt* decision. The cases subsequent to *Witt* that have had to rule on an employer's request for a credit have not been helpful in resolving the problem. However, they do illustrate the difficulties involved in attempting to satisfy both principles espoused in *Witt* at the same time.

The Context of the Problem

Three court of appeal decisions subsequent to *Witt*, while not directly facing the credit problem, have established the framework within which the Workmen's Compensation Appeals Board has attempted to resolve the credit dilemma.[54]

providing for the deduction of costs and attorney's fees before the employer's lien could attach.

53. CAL. LABOR CODE § 3861.

54. Slayton v. Wright, 271 A.C.A. 254, 76 Cal. Rptr. 494 (1969); Castro v.

In these cases the third party filed a cross-complaint against the employer, and relying on *Witt* as the basis for his argument, sought a reduction of any judgment against him equal to workmen's compensation benefits already paid and *to be paid in the future.* In *Conner v. Utah Construction and Mining Co.*,[55] the court answered this contention by stating that the *Witt* decision had merely held that where the employer had been found negligent, the damages should be reduced by the amount of workmen's compensation benefits already paid to the employee.[56] The court asserted that a reduction in the amount of benefits that might be recovered in the future was an "unusual and impractical extension of *Witt*."[57] In *Castro v. Fowler Equipment Co.*,[58] the third party defendant argued that there was no method available to the third party to prevent double recovery on the part of the employee. The court, avoiding the real problem presented by the defendant, simply stated that since no permanent disability rating had been made by the Industrial Accident Commission, it was impossible for the court to determine what the rating might be because the commission had exclusive jurisdiction to determine the compensation even where a third party action was brought before jurisdiction of the commission had been invoked.[59]

In *Slayton v. Wright*,[60] the third party argued that the employer was concurrently negligent; and if a reduction in his judgment for future compensation benefits payable were not allowed, the employer would be benefiting from his own wrong, since he would receive a credit in the amount of the net third party judgment, possibly extinguishing any obligation for further compensation.[61] In this case, as in *Castro*, there had not yet been a permanent disability rating, and since this question was within the exclusive jurisdiction of the Workmen's Compensation Appeals Board, the court could not itself determine what the rating would be. But, said the court:

> Even though a rating had been made by the . . . Commission . . . it does not necessarily follow that the [employee] would receive all that such award would allow as it may be terminated by death or other events, and to require that the [employee] should have his judgment against the tortfeasor reduced [in the sum of

Fowler Equip. Co., 233 Cal. App. 2d 416, 43 Cal. Rptr. 589 (1965); Conner v. Utah Constr. & Mining Co., 231 Cal. App. 2d 263, 41 Cal. Rptr. 728 (1964).

55. 231 Cal. App. 2d 263, 41 Cal. Rptr. 728 (1964).

56. *Id.* at 275, 41 Cal. Rptr. at 736.

57. *Id.*

58. 233 Cal. App. 2d 416, 43 Cal. Rptr. 589 (1965).

59. *Id.* at 421, 43 Cal. Rptr. at 593 (1965); *accord*, Slayton v. Wright, 271 A.C.A. 254, 266, 76 Cal. Rptr. at 501 (1969); Sanstad v. Industrial Acc. Comm'n, 171 Cal. App. 2d 32, 39, 339 P.2d 943 (1959).

60. 271 A.C.A. 254, 76 Cal. Rptr. 494 (1969).

61. *Id.* at 265, 76 Cal. Rptr. at 500.

> the permanent disability award] would mean that [the employee] would not be able to collect on his common law right . . . but would have to wait for payments on a weekly basis . . . .[62]

The court concluded that while the argument had been advanced that the plaintiff's recovery should be reduced not only by the amount that he had already received in compensation benefits, but also by any amounts that he might receive in the future, this contention had already been rejected in *Conner* as constituting an "unusual and impractical extension of *Witt*."[63]

In reaching this decision, however, the court expressly declined to voice any opinion as to whether the negligent employer should be entitled to a credit if further compensation were awarded. In this regard the court stated:

> [T]he parties herein apparently assume that [the employer] and its insurer . . . will be entitled, *ipso facto*, to a credit on [the employee's] disability awards . . . . Such an assumption may, or may not, be valid, and the question will undoubtedly have to be resolved by the Workmen's Compensation Appeals Board, which tribunal has exclusive jurisdiction to resolve the issue. It would be conjectural to venture a prediction of what the Board's decision might be in the event a petition for credit is filed by [the insurer]. While the [employer's] insurer would profit, notwithstanding the employer's negligence, in the event the credit were to be allowed, such an order does not appear inevitable.[64]

The court did note that if the employer's credit were to be denied, the employee would effect a "double recovery" as to future benefits.[65]

The Conflicting Decisions of the Appeals Board

While the courts have not faced the question of whether the negligent employer should be allowed a credit against future compensation, the Workmen's Compensation Appeals Board has, in several decisions, reached contradictory results.

Emphasis on "No Profit From Wrong"

In two cases, the board held that a determination in the third party action that the employer was negligent would bar his right to a credit.[66]

62. *Id.* at 266, 76 Cal. Rptr. at 501; *accord*, Castro v. Fowler Equip. Co., 233 Cal. App. 2d 416, 421, 43 Cal. Rptr. 589, 593 (1965).

63. Slayton v. Wright, 271 A.C.A. 254, 266, 76 Cal. Rptr. 494, 501 (1969), *quoting* Conner v. Utah Constr. & Mining Co., 231 Cal. App. 2d 263, 275, 41 Cal. Rptr. 728 (1965).

64. Slayton v. Wright, 271 A.C.A. 254, 267-68, 76 Cal. Rptr. 494, 502 (1969).

65. *Id.* at 268 n.1, 76 Cal. Rptr. at 502. n.1.

66. Pacific Auto. Ins. Co. v. Workmen's Comp. App. Bd., 31 Cal. Comp. Cases 169 (1966); Argonaut Ins. Co. v. Industrial Acc. Comm'n, 28 Cal. Comp. Cases 258 (1963).

In *Pacific Automobile Insurance Co. v. Workmen's Compensation Appeals Board*,[67] the board reasoned that since the issue of the employer's negligence was determined in the third party suit, that determination was res judicata with respect to his application for a credit. The board went on to say, by way of dictum, that if the issue of the employer's negligence had not been determined in the civil suit, the board would have had jurisdiction to determine the issue for purposes of deciding whether to grant the credit.[68] The board, however, evaded the issue of double recovery in this case by stating that there was no double recovery because the "judgment in the civil action merely represented damages for pain and suffering and for loss of wages beyond the amount of temporary disability paid, and did not include compensation for permanent disability."[69]

The measure of damages in a common law tort action, however, would normally encompass "an estimate of the plaintiff's entire future loss of earning capacity."[70] Thus, by denying a credit to the employer the board would, under usual circumstances, be allowing a double recovery to the employee, despite its statements to the contrary. By holding that the employer's right to a credit was barred by a finding of negligence in a prior third party action, the board thereby preserved the *Witt* principle prohibiting a negligent employer's recovery at the expense of the principle prohibiting double recovery by the injured workman.

Emphasis on "No Double Recovery"

The contradiction in the board's position came in 1969 in the case of *Nelsen v. Capitol Roof Structures*.[71] There, an employee injured in an industrial accident had received workmen's compensation benefits

67. 31 Cal. Comp. Cases 169 (1966).

68. In a later decision, Pearce v. Blackwell & Sunde, 33 Cal. Comp. Cases 243 (1968), the issue was specifically raised whether the board had jurisdiction to find negligence on the part of the employer and to allow a credit on the basis of that finding. It was held in that case that where there had been no specific court finding or stipulation regarding the employer's negligence in a third party suit, then the issue of negligence had no bearing on the employer's right to a credit.

69. 31 Cal. Comp. Cases at 171 (1966).

70. Nelsen v. Capitol Roof Structures, 34 Cal. Comp. Cases 238, 241 (1969). "Plaintiff may also recover the anticipated loss of his future earning through continued impairment of his working capacity after the time of trial. In determining the length of time over which he might have been expected to earn, his life expectancy at the time of the injury becomes important. It is everywhere agreed that for this purpose mortality tables . . . are admissible in evidence. They afford a rough guide, by a process of multiplying the estimated annual loss of earnings by the number of years that plaintiff might have been expected to live." W. PROSSER & Y. SMITH, CASES AND MATERIALS ON TORTS 598 (4th ed. 1967).

71. 34 Cal. Comp. Cases 238 (1969).

and then instituted suit against the third party tortfeasor. The issue of the employer's negligence was submitted to the jury and they returned an affirmative finding; the judgment was accordingly reduced by the amount of benefits paid to the date of trial. Thereafter, the injured employee sought additional compensation benefits and the carrier requested a credit against any future benefits awarded in the amount of the employee's net recovery in the third party suit. The credit was disallowed by the referee because the employer had been found to be negligent.[72] The case was appealed on the ground that it was error to refuse to allow the credit, since such refusal resulted in a double recovery to the employee.[73] The board upheld the petitioner's contention and allowed the carrier credit against future benefits to be paid.[74]

No permanent disability rating had been made in the *Nelsen* case at the time of the third party judgment. Thus, benefits paid to the injured workman up to the time of suit did not include permanent disability; consequently, such benefits were not included in the reduction of the third party judgment.[75] The board correctly concluded that the third party judgment included permanent loss of future wages, so that if the employee were granted permanent disability after the third party suit, with no reduction in the award for the recovery received from the third party, he would be receiving double recovery for permanent disability.

Since future workmen's compensation benefits, unadjudicated by the Workmen's Compensation Appeals Board, cannot lawfully reduce the judgment against the third party,[76] the only way that double recovery can be barred is through a credit to the employer in the amount of the net recovery against the third party. And, as the board stressed in the *Nelsen* case, the *Witt* decision specifically stated that double recovery should not be permitted even where the employer's negligence is a proximate cause of the injury.[77]

By this line of reasoning, the board appears to have applied the double recovery principle of *Witt* at the expense of the negligent employer principle. Nevertheless, the board felt that its decision complied with both of the principles announced in *Witt*.[78] The board held that while *Witt* established that a negligent employer could not profit from his own wrongdoing by recouping benefits against the third party tortfeasor, this principle did not apply where the employer was

72. *Id.* at 239.
73. *Id.*
74. *Id.* at 243.
75. *Id.* at 240-41.
76. *Id.* at 240.
77. *Id.* at 241.
78. *Id.* at 241-42.

seeking a credit against future compensation payments.[79]

> When seeking recoupment . . . the employer is obviously seeking affirmative relief, and in a real sense the employer . . . is a party plaintiff . . . . In such a direct attempt to recover workmen's compensation benefits paid . . . it is eminently reasonable that the employer should . . . be . . . accountable for his own contributory negligence.
>
> When asserting his right to a credit, on the other hand, the employer is attempting to off-set his further liability to the extent that the employee has already received monies from the third party tortfeasor. There is no direct attempt to recover money from the employee himself, but merely an attempt to assert a credit . . . .
>
> In this situation, the employer is not profiting from his own wrong by asserting his right to a credit . . . . Assuming the employer has been found negligent and has been denied his right to recoupment . . . the employer has already been denied a right of recovery which *but for* his wrong-doing he would have been entitled to . . . . [T]he employer has not somehow escaped his obligation to pay compensation . . . . [H]e has paid for his wrong. The question is, must he pay even more to the extent of duplicating relief which the employee has already received in the form of his net third party recovery? The question must be answered in the negative.[80]

From an analysis of these decisions, there appear to be two lines of cases attempting to harmonize, unsuccessfully it seems, the principles set forth in *Witt*. The first is concerned primarily with enforcement of the tenet that the negligent employer should not benefit from his own negligence.[81] In so prohibiting the employer's receipt of a credit against future compensation benefits, the cases allow the injured employee to receive double recovery. *Nelsen*, however, demonstrated the obvious fallacy in barring the credit.[82] The earlier the injured employee brings an action against the negligent third party, the less his benefits under workmen's compensation will be; the smaller his benefits, the less his third party judgment will be reduced. Not only does he have his common law judgment, but he may still continue to receive disability under his original award or even apply for permanent disability. Under the theory of this first line of cases, since the employer is concurrently negligent, he gets no credit for the amount of the net third party judgment and is therefore liable for the entire amount of any future workmen's compensation award. The earlier the third party suit is filed, the greater the double recovery by the employee.

79. *Id.*

80. *Id.* at 242.

81. Pacific Auto. Ins. Co. v. Workmen's Comp. App. Bd., 31 Cal. Comp. Cases 169 (1966); Argonaut Ins. Co. v. Industrial Acc. Comm'n, 28 Cal. Comp. Cases 258 (1963).

82. 34 Cal. Comp. Cases at 242-43.

The second line of reasoning places greater emphasis on assuring that the injured employee receives no such double recovery.[83] This approach, illustrated by *Nelsen*, prevents double recovery by giving the negligent employer a credit, equal to the net third party judgment, against future compensation benefits. In effect, however, the employer is allowed to benefit by his own wrong.

There seems to be no justification for distinguishing, as *Nelsen* does, between recoupment of benefits already paid, which is allowed only if the employer is free from fault, and credit for future benefits, which is allowed even if the employer is concurrently negligent with the third party.[84] The general effect of each is the same—reduction of the employer's total liability under the workmen's compensation laws.[85] Moreover, although on its facts *Witt* was limited to the question of recoupment of benefits already paid, the reasoning applies equally to a situation where an employer requests a credit against future liability. The supreme court stated in *Witt* that there was nothing in the Labor Code that suggested an intent to allow the negligent employer to take advantage of the reimbursement remedies.[86] By the same token, there is nothing in the Labor Code that suggests an intent to allow him to take advantage of the credit remedies either. Therefore, in the absence of express terms to the contrary, the credit provisions must also be deemed qualified by section 3517 of the Civil Code, which provides that "no one can take advantage of his own wrong."

To say that the relief given by the credit provisions is not profitable merely because it is not affirmative relief seems to overlook economic realities and to ignore the nature of the workmen's compensation system. Any release of capital that was previously committed to compensation of the injured employee is financially beneficial to the employer or his carrier. Under the workmen's compensation system, upon the occurrence of an industrial injury arising out of and in the course of the employment, statutory liability is imposed upon the employer for all damages that are a legitimate consequence of the injury; any relief from that liability must be sought through proper legal channels: either recoupment, through a direct action against the negligent third party or by a lien on the employee's judgment against the third party; or credit, through filing a claim with the Workmen's Compensation Appeals Board. Both methods of relief should logically be subject to the same qualification of freedom from fault, since both result in a reduction of the overall liability imposed under the workmen's com-

83. Nelsen v. Capitol Roof Structures, 34 Cal. Comp. Cases 238 (1969).

84. *Id.* at 241-42.

85. 6 S. CAL. L. REV. 258, 259 (1933).

86. Witt v. Jackson, 57 Cal. 2d 57, 72, 366 P.2d 641, 649, 17 Cal. Rptr. 369, 377 (1961).

pensation statutes.

As the cases discussed above demonstrate, no satisfactory solution has as yet been presented for the simultaneous enforcement of both *Witt* principles when the employer's right to a credit is involved. In order to remedy such a situation, major changes in the workmen's compensation laws are necessary.

Solutions to the Dilemma

Overrule Witt v. Jackson

The first possible solution would be to provide by statute that the employer's negligence in no way bars his right to recoup amounts paid as compensation benefits to the injured employee, thereby nullifying the *Witt* decision. In fact, the majority of jurisdictions hold that the employer's contributory negligence is irrelevant because (1) his cause of action against the third person is derivative, and the employer's negligence would not be a defense against the employee; and (2) the workmen's compensation act did not expressly preclude his recovery if he was concurrently negligent.[87]

An argument often relied upon in support of this solution is based on the fact that in a great many cases where the employer is found to be concurrently negligent, it is actually the negligence of a fellow employee, which has contributed to the injury of the employee, for which the employer is held responsible. Because the employer is not personally negligent, allowing him to recover under such circumstances should create no moral indignation.[88] Furthermore, since at common law the fellow servant rule precludes holding the employer vicariously liable for the negligent act of one employee which injures another employee, it is legally inaccurate to hold the employer responsible for the negligence of the coemployee in an action against the third party.[89]

This solution, of course, would deprive the injured employee of a double recovery for his injures, but would fail to deal with the "odd spectacle . . . [of] a negligent employer reimbursing himself at the expense of a third party."[90] In addition, while the purpose of the workmen's compensation system is to impose liability without fault, it does not necessarily follow that when an employer is at fault, he is in any way to be relieved of that liability. Where the employer is not at fault in causing the injury, the workmen's compensation statutes expressly provide that he may recover any expense or liability under the workmen's compensation laws as a consequence of the acts of the

87. *Id.* at 70-71, 366 P.2d at 649, 17 Cal. Rptr. at 377; *see* 2 LARSON § 75.23.
88. 2 LARSON § 75.23.
89. *Id.*
90. *Id.*

negligent third party.[91] However, where the employer is himself negligent, there appears no sound basis for placing the entire burden of damages upon the negligent third party, when in fact he and the employer are concurrent or joint tortfeasors. In this situation, the third party has caused the employee no damages to which the employer has not contributed. This solution, therefore, allows the negligent employer to benefit from his own wrong at the expense of the third party, simply to prevent a double recovery to the employee. One principle of *Witt* is preserved at the expense of the other.

Double Recovery as an Amount from a Collateral Source

The second possible means of reconciling the conflicting *Witt* principles is to treat the double recovery of the injured employee as an amount received from a collateral source. This theory has been stated succinctly as follows:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer . . . is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer.[92]

In *De Cruz v. Reid*,[93] at the time the injured employee brought an action against the negligent third party, he and his employer, with the consent of the Industrial Accident Commission, had entered into an agreement of compromise and release whereby the employer waived his right to subrogation[94] as part of the consideration. In the third party suit, the defendant attempted without success to introduce evidence of the $18,000 received from the settlement. He contended that even if the employer were nonnegligent, his waiver of the right to reimbursement must inure to the benefit of the third party tortfeasor, rather than to the employee. The court, however, held that since the defendant had introduced no evidence bearing on the concurrent negligence of the employer, he did not bring himself within the *Witt* holding requiring a reduction in judgment. In reaching this result, the court stressed that compensation benefits for which reimbursement is waived by a nonnegligent employer inure to the benefit of the employee as payments received by him from a collateral source and do not constitute an impermissible double recovery.[95]

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91. See text accompanying note 24 *supra*.

92. Anheuser-Busch, Inc. v. Starley, 28 Cal. 2d 347, 349, 170 P.2d 448, 450 (1946).

93. 69 Cal. 2d 217, 444 P.2d 342, 70 Cal. Rptr. 550 (1968).

94. *See generally* CALIFORNIA WORKMEN'S COMPENSATION PRACTICE 593 (Cal. Cont. Educ. Bar ed. 1963).

95. 69 Cal. 2d at 226-27, 444 P.2d at 348, 70 Cal. Rptr. at 556; *accord*, Quast v. Operated Equip. Co., 265 A.C.A. 863, 866 (1968).

This reasoning fails to recognize that the rule against double recovery is aimed at preventing unjust enrichment, regardless of the sources from which recovery is received.[96] Plaintiff will not be allowed to take advantage of fortuitous circumstances which make more than one person legally responsible for his injuries.[97] This proposition was argued by Chief Justice Traynor in his dissenting opinion in the case of *Anheuser-Busch, Inc. v. Starley*:[98]

> "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Whether the persons . . . responsible . . . have acted jointly or separately is immaterial, for the controlling questions are whether the loss for which they are responsible is identical and whether the payment by one . . . has fully compensated the plaintiff.[99]

It is especially difficult to apply the collateral source rule where the employer would be denied recoupment on the grounds that he is a concurrent tortfeasor, since the collateral source rule does not apply to concurrent tortfeasors.[100] Because the negligence of the employer was not pleaded and proved in the *De Cruz* case,[101] the employer was not, in effect, a concurrent tortfeasor. Consequently, application of the collateral source rule in that case was not the same as an application of the rule where the employer has been found to be concurrently negligent in causing the injury. In conclusion, this solution also satisfies one principle of *Witt* at the expense of another. It prevents the employer from benefiting from his own wrong by inaccurately applying the term collateral source to the double recovery received by the injured employee.

It should be noted that the foregoing solutions do not actually reconcile the principles of *Witt*. What they do is nullify one principle to dispose of the problem.

Reduction of Third Party Judgment by Estimated Future Benefits

A third proposal would entitle the third party tortfeasor to plead and prove the negligence of the employer and then have the judgment against him reduced by the amount of benefits paid and to be paid in the future. The third party would be required to produce expert testimony predicting the employee's permanent disability rating, if any, on

96. Anheuser-Busch, Inc. v. Starley, 28 Cal. 2d 347, 353, 170 P.2d 448, 452 (1946) (Traynor, J., dissenting).

97. *Id.*; PROSSER 266-68.

98. 28 Cal. 2d 347, 170 P.2d 448 (1946).

99. *Id.* at 352, 170 P.2d at 451 (citations omitted).

100. *See* PROSSER 266-68. *See generally* Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets*, 53 CALIF. L. REV. 207, 216-18 (1965).

101. 69 Cal. 2d 217, 444 P.2d 342, 70 Cal. Rptr. 550 (1968).

which his future benefits would be based. This predicted rating would not be binding on the Workmen's Compensation Appeals Board in any future proceeding to determine actual permanent disability. Moreover, jurisdiction to make the award would still remain with the board. This proposal has the advantage of defeating double recovery by the injured employee, while also preventing the employer from taking advantage of his own wrong. In the *Castro* case,[102] of course, the court said that it would not determine what the rating might be, since the commission has exclusive jurisdiction to determine compensation.[103] The court apparently assumed that the determination of the amount of estimated future benefits by which the third party judgment was to be reduced would be the final determination, for purposes of a workmen's compensation award, of the employee's permanent disability rating.[104] It failed to see the possibility of using expert testimony merely to *predict* the rating in order to aid the jury in establishing the amount of damages to which the injured employee was entitled.

Although this solution reconciles the *Witt* principles, in doing so it may result in somewhat of a windfall to the negligent third party, because the employer is required, without regard to the amount of the third party judgment, to pay the entire amount of workmen's compensation benefits. Where the third party judgment and the workmen's compensation award are relatively equal, the employer will assume almost the entire burden of damages, while the negligent third party will benefit by the fortuitous circumstance that the man he injured was covered by workmen's compensation. The result of this solution would be an inequitable system for distribution of the damages resulting from an industrial injury.

Proration of Damages

The last alternative proposed is believed by this author to present the most viable and equitable means of distributing the damages between the third party tortfeasor and the negligent employer, while preventing the injured workman from receiving double recovery for his injuries. This approach, as will be demonstrated, makes it possible to remain within the context of the *Witt* decision without opening an avenue through which the third party can escape liability.

The basis for the distribution, under this system, would be a proration of damages according to the respective liabilities of the two negligent parties. In effect, a modified form of contribution would be allowed, with the employer's liability limited to that imposed by the

102. 233 Cal. App. 2d 416, 43 Cal. Rptr. 589 (1965).
103. *Id.* at 421, 43 Cal. Rptr. at 593.
104. *See id.*

workmen's compensation laws, and the third party's limited to the judgment obtained against him. Proration as a means of adjusting unequal liabilities is not new to the law. For example, proration is considered the logical and equitable solution to the problem of allocating ultimate responsibility for losses insured by more than one carrier, where the policies have different applicable limits.[105] The relation of this principle to the *Witt* situation is best illustrated by an example.

An injured workman has applied for and received $1000 in temporary disability. He brings suit against the negligent third party and obtains a judgment of $40,000. To reduce his liability, the third party pleads and proves the concurrent negligence of the employer, thereby reducing the amount payable to $39,000. After deducting attorney's fees and costs of $9000, the injured workman has received a net judgment of $30,000. He then applies for a permanent disability rating and is granted an award that will amount to $14,000 during his lifetime. The employer will be entitled to a credit against his liability in the amount of the net third party judgment; consequently, his liability is reduced by $30,000, and he will not be responsible for payment of benefits up to that point.

The third party will have a right of action against the employer to recoup the amount which he has expended in payment of the employer's pro rata share of the damages. This action will have to be filed within a reasonable amount of time after the final disability award is made.

The amount to which the third party is entitled is figured as follows: The third party has a judgment against him for $40,000; the employer is liable for $15,000, $1000 for temporary and $14,000 for permanent disability. The employee is entitled to recover the larger of the two liabilities. To prorate the damages, the two liabilities are totalled, and the share of each is determined. The third party's portion is $40,000/$55,000 or 8/11 of the $40,000 judgment, making him liable for $29,090. The employer's share is $15,000/$55,000 or 3/11 of $40,000, resulting in liability of $10,909. The third party has paid $39,000 in satisfaction of his judgment, and may recover the amount by which the sum he has paid exceeds his pro rata share, in this instance $9910. Since the employer has paid $1000 in temporary disability, he will pay *in toto* $10,909, $1000 directly to the employee, $9910 to the third party.

Because the larger of the awards is prorated according to respective liabilities, neither party will ever be required to pay the full amount against him. Therefore, even where the workmen's compensa-

105. *E.g.*, Meritplan Ins. Co. v. Universal Underwriters Ins. Co., 247 Cal. App. 2d 451, 55 Cal. Rptr. 561 (1966); Colby v. Liberty Mut. Ins. Co., 220 Cal. App. 2d 38, 46-48, 33 Cal. Rptr. 538, 543-44 (1963).

tion award is larger than the third party judgment, if the third party has satisfied the judgment, he will be entitled to recoupment from the employer.

The action by the third party against the employer merely determines the rights between the two negligent parties, and in no way prevents the injured employee from later obtaining an additional award of workmen's compensation benefits. The employer will have the balance of the credit, secured upon the employee's original request for permanent disability, to apply against any additional award made. The $30,000 credit was applied to the original award, leaving a balance of $16,000 on the record. If an additional award of $23,000 is made, the employer will apply the $16,000 balance to the award, leaving him with a $7000 liability. The employee receives a total of $38,000, $1000 temporary disability from the employer, $30,000 net third party judgment, and $7000 in additional workmen's compensation benefits.[106]

This proposal reconciles the principles of *Witt*, preserves the purposes of the workmen's compensation system, and prevents the negligent third party from escaping his common law liability at the expense of the insured employer. The negligent employer is required to pay a pro rata share of the damages, with limitations set by the applicable workmen's compensation laws. He in no way benefits from his own wrong. The injured employee retains his right to receive workmen's compensation benefits and his right to bring a suit in tort against the negligent third party; but he is prevented from receiving a double recovery for the same injury. And the negligent third party tortfeasor pays his pro rata share of the damages by satisfying the judgment against him and then bringing an action against the employer to recoup the amount paid in his behalf.

*Ronni Jackl**

106. The total amount paid by the employer and the third party tortfeasor will be $47,000, but since $9000 was allocated to costs and attorney's fees, the employee will net only $38,000.

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